Planning Act 2008 (as amended) and The Infrastructure Planning (Examination Procedure) Rules 2010 (as amended)1 – Rule 17

Application by Transport for London (TfL) for an Order Granting Development Consent for the Silvertown Tunnel Project

Initial response of Friends of the Earth EWNI re. request for further information re. Clientearth judgment

1. Friends of the Earth England Wales & Northern Ireland ("FoE") believes that a period of just six days within which to respond to the above request for further information is inadequate. The Clientearth judgment is complex, far reaching and raises a number of important questions regarding the Silvertown Tunnel Project (the "Project") and the assessment of its environmental impacts. Given the shortness of time, FoE's representations set out below must therefore be regarded as a provisional or initial statement of its position (not limited merely to question 3) and FoE reserves the right to re-visit and add to some or all of the points outlined during a more reasonable period of time (for example by deadline 2 of 14 December).

2. FoE argues that the Clientearth judgment imposes two key duties on decision makers which must be complied with in relation to the Project also:

    a. substantive duty – to ensure that air quality complies with binding duties "within the shortest possible time" and by the most effective route;
    b. process duty – to ensure that proper assessment of the air quality impacts based on robust modelling is undertaken.

3. Garnham J's judgment of 2 November[1] offers a vigorous critique of government air quality policy in its current form. The judgment makes clear that:

    (a) "limit values" contained in the Air Quality Directive (2008/50) are mandatory[2];
    (b) non-compliance must be kept "as short as possible"[3];
    (c) Member States' discretion as to the measures to be adopted is "narrow and greatly constrained"[4];
    (d) the duty on Member States to bring themselves back into compliance is one of "result" not "conduct"[5];
    (e) the determining consideration in what methods to use to secure compliance must be their efficacy not their cost[6];
    (f) the dates set for compliance (2020 and 2025 in London) fail to comply with the duties in the Directive[7];
    (g) modelling used by government is flawed – in particular Euro 6 diesel cars are up to 4.5 times over the legal emissions limit[8].

[1] Para 42 et seq.
[2] Para 45.
[3] Para 50.
[4] Para 46.
[5] Para 47
[6] Para 50.
[7] Para 69.
[8] Para 79.

4. The substantive duty, to comply with limit values in as short a period as possible, clearly applies in this case. Representations made by Hackney & Tower Hamlets Friends of the Earth point to the very poor air quality which appertains there (being an Air Quality Management Area) and the applicant does not deny that levels are currently poor in the area[9].

5. Given the target date for compliance set by the UK government is unlawful, the developer's argument that the development will not place achievement of compliance by that date in jeopardy is immaterial (see for example National Networks NPS). In any event, the developer's approach fails to have regard to the duty in Article 13 of the Directive to achieve compliance "throughout their zones and agglomerations". Accordingly, it is simply unlawful to argue that air quality in one part of an air quality zone can be made worse (with attendant impacts on human health) merely because air quality in another area is worse. Perhaps the key reason for this is the purpose of the Directive, namely to protect human health, whereas worsening air quality in another area nonetheless has seriously harmful impacts on individual health.

6. Further, FoE argues that the judgment provides authority for the proposition that government must adopt the quickest route to secure compliance – see for example paragraph 50 of the judgment in which Garnham J judgment makes clear that measures under consideration would enable quicker compliance with limit values, cannot be discounted merely on the grounds of cost[10].

7. So far as the process duty is concerned, it is clear that the modelling on which the UK national plan is based are unlawful. To the extent that some or all of the modelling used or relied on by the developer is the same or similar, it clearly cannot be relied on by the ExA in this case in order to take a robust decision.

8. FoE reminds the ExA that the duties in the Directive are enforceable against any emanation of the state[11], thus it is no answer to argue that these are matters wholly for central government. Finally, FoE submits that in light of now well established jurisprudence (Supreme Court judgment and EU Court of Justice judgment of 2015 and now the High Court judgment of 2 November), air quality non-compliance can no longer be considered as simply another "material consideration" to be taken into account – it is a determinative matter concerning the grant of consent.

9. On other issues, FoE notes that the development would result in traffic increase in other areas (eg: Dartford – figure 7.3). In other words, congestion redistribution would occur. This would be expected to worsen air pollution at these locations and is unacceptable in air quality terms also. The developer's baseline traffic assessment assumes there would be traffic increase without the scheme (5.3.1) but FoE argues this is unnecessarily pessimistic – indeed traffic must at least remain stable or decrease for air quality reasons.

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[9] See for example Non-Technical Summary
[10] Para 50
[11] Constanzo [1989] ECR 1839